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Utah Court of Appeals

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Suzan Pixton; Workforce Appeals Board; Michael E. Bulson; Utah Legal Services, Inc.; Attorney for Respondents.

Sarah J. Beck; Corporate Counsel; Attorney for Petitioner.

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IN THE UTAH COURT OF APPEALS

TARGET INTERACT US, LLC,)

Petitioner,)

v.)

WORKFORCE APPEALS BOARD,)
DEPARTMENT OF WORKFORCE)
SERVICES, AND JODY PETERSON,)

Respondents.)

Case Number 20090904-CA

**REPLY BRIEF OF PETITIONER
TARGET INTERACT US, LLC**

Writ of Review from a Final Administrative Agency Decision
of the Workforce Appeals Board,
Utah Department of Workforce Services

Suzan Pixton (2608)
Workforce Appeals Board
Utah Department of Workforce Services
140 East 200 South
PO Box 145244
Salt Lake City, Utah 84145-0244

Sarah J. Beck (08231)
Corporate Counsel
50 West Broadway, 10th Floor
Salt Lake City, Utah 84101-2020
Telephone (801) 649-3805
Facsimile (801) 649-4749

Attorney for Workforce Appeals Board

Attorney for Target Interact US, LLC

Michael E. Bulson (00486)
Utah Legal Services, Inc.
205 North 400 West
Salt Lake City, Utah 84103-1125

Attorney for Jody Peterson

TARGET INTERACT US, LLC,

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DEPARTMENT OF WORKFORCE
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Suzan Pixton (2608)
Workforce Appeals Board
Utah Department of Workforce Services
140 East 200 South
PO Box 145244
Salt Lake City, Utah 84145-0244

Attorney for Workforce Appeals Board

Sarah J. Beck (08231)
Corporate Counsel
50 West Broadway, 10th Floor
Salt Lake City, Utah 84101-2020
Telephone (801) 649-3805
Facsimile (801) 649-4749

Attorney for Target Interact US, LLC

Michael E. Bulson (00486)
Utah Legal Services, Inc.
205 North 400 West
Salt Lake City, Utah 84103-1125

Attorney for Jody Peterson

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ARGUMENT

I. RESPONDENTS' ASSERTION OF A CREDIBILITY DETERMINATION FLIES IN THE FACE OF THE PLAIN DOCUMENTARY EVIDENCE.

This is not a case of he said/she said, requiring, *per se*, a credibility determination solely on the basis of testimony adduced by the Administrative Law Judge (ALJ) during a single telephonic hearing. Rather, the rules, and precedent set out by this Court, dictate that this matter be decided on a basis borne out of the totality of or "substantial evidence" submitted by the parties. Target Interact provided such substantial evidence, whereas, the Claimant provided nothing but his verbal testimony, during the telephonic hearing only.¹ Target Interact demonstrated each of the elements required of it by Utah Administrative Code (UAC) R994-405-202. Those proven elements are in evidence as follows:

KNOWLEDGE --

1. Target Interact's tardiness and attendance policy, acknowledged and signed by Claimant (R, 17-27).
2. Target Interact August 29, 2008, eMail Job Description, setting forth hours of attendance (R, 45).
3. Claimant's documented ledger violations of Target Interact's tardiness and attendance policies, by way of an automated timekeeping system (R, 32-35).

¹ Curiously, the ALJ functions as the examining attorney for both sides, judge, and jury. The nature of the proceeding is very leading, the ALJ conducts every aspect of the hearing, grants permission or not with respect to any line of questioning, a particular question, and literally gags a participant from saying anything that the ALJ doesn't like or want in the record by telling Claimant to "STOP!" (see Telephonic Hearing testimony, R @ 123). The design of the system smacks of some sort of absolute, governmental rule.

CULPABILITY --

4. Claimant was progressively warned, both verbally and in writing, that his actions were violating Target Interact attendance policy (R, 49-50, 140-143).
5. Claimant understood the mission critical nature of his employment, and that tardiness and absenteeism could not be tolerated (R, 17-27). The pertinent part of Target Interact's policy, acknowledged by Claimant, in writing, reads:

“Staffing and scheduling are critical factors for Target, and we depend on you to be on the front lines in order to make the business a success. You need to commit yourself to being to work during your scheduled shift on time. Problems with attendance cannot be tolerated....”

UAC Rule R994-405-201 provides that an Employer only show “some fault” on the part of the Employee leading to their termination, in order for them to be found ineligible to claim unemployment benefits. See also, Utah Code Ann. § 35A-4-405(2)(a).

CONTROL --

Given the demonstration of the knowledge and culpability elements on Target Interact's part, there is nothing in the record indicating that Claimant was not in control of his behavior or actions. Kristine Adams testified that in January 2009 she revoked any perceived permission that Claimant felt he had been given to be late for work (R, 140-143). He continued to arrive late for work, habitually, and received a written warning by eMail on February 4, 2009 (R, 49). Although he claims not to have received that piece of correspondence, Target Interact's eMail server log reflects that the message was delivered to Claimant on that date.

However, giving the benefit of the doubt to Claimant that he never received the subject eMail, or that it was fabricated as he suggests, Claimant was warned again verbally on May 12, 2009, by Kristine Adams, which Claimant actually did acknowledge receiving (R, 123-125). That warning, memorialized by Ms. Adams thereafter, as Claimant's final warning, was prepared between May 12 and May 19, 2009, when Claimant called out again from work for being sick. At that point Ms. Adams followed-through and terminated Claimant, when she spoke to him on May 20. He told her he was again planning to call out sick that day, May 20. So put another way, Claimant was verbally warned May 12 not to be late or sick again during his yearly cycle period² (ending June 17, 2009), or he would be discharged for violating the Target Interact attendance policy. Hardly another week had elapsed before he called out sick. Ms. Adams was not even able to prepare and get the Claimant to sign the final written warning during that time frame. He was subsequently terminated for the additional violation, and then refused to come in and sign the warning after he was discharged.

II. CLAIMANT'S FINAL ABSENCE WAS WITHIN HIS CONTROL AND WAS NOT EXCUSED.

There is absolutely nothing in the record providing an excuse for Claimant's final, termination-induced absence. At no time after his discharge or during the course of the proceedings below has Claimant ever submitted evidence that he was actually sick on the

²

Target Interact employees are allowed five (5) PTO (Personal Time Off) days on a no questions asked basis over the course of a year's period. Claimant had exceeded the number of allowed days. Excessive late days can aggregate into absences.

days in question. No doctor's note or other similar type of evidence. In fact, to support a finding that Target Interact proved the element of culpability, the ALJ wrote in her decision that: "Claimant was also terminated for absenteeism. When Claimant missed work, it had a severe impact on the Employer's workflow. Other workers had to be pulled from their own job responsibilities to handle the Claimant's job duties. Culpability has been demonstrated" (see, *Decision of Administrative Law Judge*).

III. ALJ AND WORKFORCE APPEALS DECISIONS ARE AT ODDS.

Respondents assert that Target Interact failed to prove any of the elements of just cause discharge. That claim simply misstates the record below. The ALJ found that both (1) culpability and (2) knowledge were proven by Target Interact, and that only the element of (3) control was lacking. Conversely, the Workforce Appeals Board fully adopted the factual findings, reasoning and conclusions of law of the ALJ. That means only control is at issue. Therefore, Respondents are patently incorrect in arguing a negative that was clearly found in Target Interact's favor by the ALJ. Moreover, the substantial evidence doctrine established by this Court dictates that Target Interact also demonstrated that the control element was proven as well. In any event, the decisions of the ALJ and Workforce Appeals Board are at odds, and this Court should reconcile between them, or return the case to the ALJ for rehearing.

IV. TARGET INTERACT DID MARSHAL THE EVIDENCE.

Target Interact marshaled the evidence. See Brief of Target Interact, pages 12-13. While the marshaling effort may not be to Respondents' liking, the presentation of the

evidence is accurately and succinctly stated. Claimant merely asserts in his verbal telephone hearing testimony, that he (1) did nothing wrong to warrant being discharged, (2) was never late without permission, (3) had no unexcused absences, and that (4) the entirety of the evidence against him was fabricated (R, 122-129).

V. TRUST IN GOVERNMENT AND DUE PROCESS IS ESSENTIAL AND ELEMENTARY TO A FAIR AND JUST RESULT.

Target Interact takes no pleasure in pointing out that Alison Beardall lied during the adjudication process. Nevertheless, the evidence shows she did (R, 171-172).

Telephone records reflect that there were three telephone calls and/or message exchanges between Ms. Beardall and Kristine Adams, ranging from two (2) minutes to twelve (12) minutes during the period June 3 through June 8, 2009. Ms. Beardall denies that she had any of those conversations with Ms. Adams. She also denies having received evidence about Claimant's Target Interact workplace attendance. Those telephone calls and the documentary evidence in question formed, at least in part, the basis of the initial decision made by Ms. Beardall in this case, and that decision is clearly tainted by some form of evidence mishandling on Ms. Beardall's part. It begs the question, what other conduct may have occurred within the Utah Department of Workforce Services to undermine the factual findings and/or reasoning in this proceeding?

CONCLUSION

The ALJ determined that Target Interact met its burden of proving knowledge and culpability below. The Workforce Appeals Board fully adopted the ALJ's decision. The "substantial evidence" submitted by Target Interact further showed that Claimant was in control of his behavior and/or actions. Each of the just cause discharge elements were thus demonstrated by Target Interact. To affirm the decision below would be contrary to the plain evidence, and supports unreasonable and irrational unemployment claim handling. The evidence also reveals wrongdoing on the part of the initial adjudicator below, which infects the decision below with a due process violation, and warrants rehearing of this case anew.

DATED this 1st day of June, 2010.

Respectfully submitted,

Sarah J. Beck

Sarah J. Beck
Attorney for Target Interact US, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 1, 2010, she caused a true and correct copy of the foregoing "REPLY BRIEF OF PETITIONER" to be served upon each of the Respondent Parties, by mailing the same to each through the United States Postal Service, Priority Mail, postage prepaid, addressed as follows:

Suzan Pixton
Workforce Appeals Board
Utah Department of Workforce Services
140 East 200 South
PO Box 145244
Salt Lake City, UT 84145-0244

Attorney for Workforce Appeals Board,
Utah Department of Workforce Services

Michael E. Bulson (00486)
Utah Legal Services, Inc.
205 North 400 West
Salt Lake City, Utah 84103-1125

Attorney for Jody Peterson

Sarah J. Beck

Sarah J. Beck
Attorney for Target Interact US, LLC